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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 698

IRVING GROOB, Trustee in Bankruptcy of the STARR BROTHERS BELL COMPANY, Bankrupt, PETITIONER

v.

RECONSTRUCTION FINANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RECONSTRUCTION FINANCE CORPORATION IN OPPOSITION

OPINIONS BELOW

The decision of the Referee in Bankruptcy (Pet. App. p. 9) is unreported. The memorandum decision of the District Court for the District of Connecticut (Pet. App. pp. 10-11) is reported at 127 F. Supp. 952. The *per curiam* opinion of the Court of Appeals for the Second Circuit (Pet. App. 12) is reported at 218 F. 2d 641.

JURISDICTION

The judgment of the Court of Appeals was entered on January 4, 1955 (Pet. App. p. 13). The petition for a writ of certiorari was filed on April 4, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether under Connecticut law a recorded mortgage and note which provide, in addition to fixed monthly payments of interest and principal, for annual principal repayments contingent on the mortgagor's earnings give sufficient notice of the incumbrance to be enforceable against subsequent creditors.

STATUTES INVOLVED

The pertinent provisions of Connecticut General Statutes (1949 Revision) are as follows:

> *Sec. 7091. Deeds to be recorded.* No conveyance shall be effectual to hold any land against any other person but the grantor and his heirs, unless recorded on the records of the town in which the land lies; * * *
>
> * * * * *
>
> *Sec. 7265. Tangible personal property may be mortgaged.* Any tangible personal property, except those chattels hereinafter specifically excluded, may be mortgaged by a deed containing a condition of defeasance and a particular description of such property, the amount of the debt and the terms of repayment, executed, witnessed and acknowledged as are deeds of

land and filed in accordance with the provisions of section 7268. Any tangible personal property may be mortgaged, together with real estate on which it is situated. When any tangible personal property is mortgaged, together with real estate, it shall be recorded and may be foreclosed as if it were wholly of real estate.

STATEMENT

By his petition to this Court, the trustee in bankruptcy seeks again to attack the validity under Connecticut law of a combined real estate and chattel mortgage which has been upheld in turn by the Referee in Bankruptcy, the District Court and the Court of Appeals for the Second Circuit.

On the basis of this mortgage, the Reconstruction Finance Corporation [1] filed a proof of claim in these bankruptcy proceedings as a secured creditor for

[1] The Reconstruction Finance Corporation is now in process of liquidation but it still has the power to appear as respondent herein. In 1953, Congress directed the expeditious liquidation of R.F.C. and provided for the termination of its succession and powers by June 30, 1954. Act of July 30, 1953, Sec. 102(a), 67 Stat. 230. By 1954 amendments, Congress extended the Corporation's succession, including its power to sue and be sued, to complain and to defend" (15 U.S.C. 66(a)), until the R.F.C. is dissolved. Act of June 29, 1954, Sec. 2(b), 68 Stat. 320. This dissolution will occur after liquidation of assets, when the Secretary of the Treasury shall retire the Corporation's capital stock, dispose of unused funds and make a final report to Congress. 15 U.S.C. 609, amended by Act of June 29, 1954, Sec. 2(b), 68 Stat. 320. Termination in 1953 of the power of the Reconstruction Finance Corporation to make loans to business enterprises, such as the bankrupt, did not affect the validity or performance of any agreement previously made. 15 U.S.C. 604(f), amended by Act of July 30, 1953, Sec. 102(b), 67 Stat. 230.

the unpaid balance of its loan to the bankrupt and interest thereon (R. 7-9). The mortgage had been executed and delivered by the bankrupt (Starr Brothers Bell Company), prior to bankruptcy, to the Reconstruction Finance Corporation as security for repayment of the loan; it covered land, machinery and other tangible and intangible property used in the bankrupt's business (R. 17-25). The mortgage incorporated by reference the terms of the note secured thereby (R. 21) and was duly recorded with a copy of the note attached as an exhibit (Pet. App. p. 10; R. 24, 39).

The original principal amount of the loan was $22,500, set forth in the mortgage and note (R. 12, 17). The terms of the note required monthly payments of interest at the rate of 4% per annum and monthly payments on account of principal in the amount of $381.35 (R. 12). In addition, if the total of these fixed principal payments made during a year was less than 50% of the bankrupt's annual net earnings before depreciation, determined in accordance with good accounting practice, a further payment was required in the amount of that difference (R. 12). The entire balance was due within five years from the date of the note (R. 12).

The trustee acknowledged the debt but applied for its disallowance as a secured claim and its allowance as a general, unsecured claim in an amount to be determined (R. 5-6). He contended that the repayment terms were ambiguous and uncertain and that therefore the mortgage could not be enforced under Connecticut law, because the provi-

sion for additional contingent payments made it impossible for third parties to determine from the recorded instruments the amount of the incumbrance at any time.

The Referee in Bankruptcy disallowed the trustee's application and held that the Reconstruction Finance Corporation had a valid lien on the proceeds of the sale of the property covered by the mortgage [2] in the amount of $19,264.00, consisting of unpaid principal and interest up to January 7, 1954, with such further interest as may accrue (Pet. App. p. 9; R. 33-34).

The District Court confirmed the order of the Referee (Pet. App. pp. 10-11; R. 38-40). It noted that the recorded instruments expressly provided the amount of the loan, interest and minimum principal repayments. While the exact additional amounts payable each year on principal could not be determined from the face of the instruments, the method of determination and the sources of information were clearly indicated, the court held, and that is all which can be reasonably required of such a contingent payment provision.

In a *per curiam* opinion, the Court of Appeals held that Section 7265 of the Connecticut Statutes, *supra*, pp. 2-3, was satisfied by incorporating in the mortgage a copy of the note. The court found without basis the additional argument (not raised in

[2] Pursuant to court order, the bankrupt's property had been sold free and clear of liens and Reconstruction Finance Corporation had petitioned to establish a lien on the proceeds of sale. (R. 31-33).

this Court) that the terms of repayment were too indefinite to constitute a valid contract, and affirmed on the opinion of the District Court (Pet. App., p. 12).

ARGUMENT

The recorded instruments set forth the total principal amount of the loan, the interest rate, the amount of fixed monthly payments on account of principal, and a formula for calculating additional annual payments contingent on the earnings of the company. Petitioner contends these instruments are invalid under Connecticut law against subsequent creditors. The courts below properly held that under Connecticut law the mortgage is valid against such creditors. Moreover, the issues raised by petitioner relate only to the interpretation of Connecticut statutes and authorities, issues which are not of general interest or significance. Accordingly, review by this Court is not warranted.

1. The Supreme Court of Errors of Connecticut has several times held that a recorded realty mortgage is valid against subsequent creditors if it describes the debt secured with sufficient certainty to enable creditors to ascertain the amount of the incumbrance from its terms and reasonably diligent inquiry. *Stein* v. *Davidson*, 110 Conn. 4, 8, 12; *First National Bank* v. *National Grain Corporation*, 103 Conn. 657, 662-63; *Lampson Lumber Co.* v. *Chiarelli*, 100 Conn. 301, 306-312; *Weissman* v. *Volino*, 84 Conn. 326, 328-29; *Hubbard* v. *Savage*, 8 Conn.

215, 219. That general standard is the controlling one.[3]

Petitioner relies upon certain decisions finding a debt insufficiently described, but none of these decisions governs here. *Andrews* v. *Connecticut Properties, Inc.*, 137 Conn. 170 (Pet. pp. 3, 5), is one of a line of cases requiring truthful description of the nature of the obligation secured, such as whether it was an unconditional debt or an obligation to indemnify. *Pettibone* v. *Griswold*, 4 Conn. 158, 162-63 (Pet. p. 4), held invalid a mortgage which left the debt unlimited in subject matter or amount. In the leading case of *Hart* v. *Chalker*, 14 Conn. *77 (Pet. p. 4), the court held that where there is an

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[3] Petitioner continuously refers to the mortgage herein as a *chattel mortgage*, presumably to enable him to press the effect of Conn. Gen. Stat. Sec. 7265, *supra*, pp. 2-3, which provides that chattels may be mortgaged by a filed deed containing among other elements "the amount of the debt and the terms of repayment." The statute governing the recording of real estate mortgages contains no such provision. Conn. Gen. Stat. Sec. 7091, *supra*, p. 2. Moreover, Section 7265 further provides that when chattels are mortgaged together with real estate, as was done here, the mortgage shall be recorded and may be foreclosed as if it were wholly of real estate. The effect of this provision is to make the above quoted portion of Section 7265 inapplicable to the mortgage here involved. *Rood* v. *Welch*, 28 Conn. 157, 162-63. In any case, as pointed out in the text, the recorded instrument does specify the amount and repayment terms. And since comparable policies are involved, the same general standard exists for description of the obligations secured by chattel mortgages and mortgages. *Rood* v. *Welch*, 28 Conn. at 162. Compare Jones, *Chattel Mortgages and Conditional Sales*, Secs. 86, 94, 95, with Jones, *Mortgages*, Secs. 88, 425, 426, 447, 450. Petitioner himself relies primarily on cases concerning realty mortgages.

ascertained debt the spirit of the recording system requires the mortgage to set it forth. However, the court continued, where there is no ascertained debt it is required only that the recorded instrument show "the real state of the title, so far as it can be known" and put interested parties on the track leading to discovery, 14 Conn. at *78.

Numerous mortgages have been enforced in Connecticut which set forth the total amount of the debt but under which the exact amount secured at any specific time varied with subsequent events. Thus, mortgages are valid when advances secured by it are to be made at unspecified points in the future (*Lampson Lumber Co.* v. *Chiarelli, supra; Hubbard* v. *Savage, supra*) or at certain stages in the future performance of a contract. *Stein* v. *Davidson, supra; Weissman* v. *Volino, supra.* Similarly, the Connecticut court has held valid a mortgage which obligates the mortgagor to repay on fixed installments, although this requires creditors to go beyond the instrument to ascertain the exact indebtedness at any subsequent time. See *King* v. *Kilbride,* 58 Conn. 109, 119-20, *Winchell* v. *Coney,* 54 Conn. 24, 31. All these mortgages were considered enforceable despite the "element of uncertainty" present in each case arising necessarily from a "contingency * * * as to what may be done in the future." *Weissman* v. *Volino,* 84 Conn. at 329.

The instruments in the instant case contain only one such contingency and they provided a much surer guide to the determination of the specific debt

than in some of the cases above cited.[4] The amount of the total advance is fixed and definite, $22,500. Certain fixed monthly repayments are prescribed and the provision for additional annual payments put interested parties on notice to inquire as to the bankrupt's income figures for each fiscal year (determined according to good accounting practice), and to the amount of payments contingent thereon, information which was available either from the bankrupt or the Reconstruction Finance Corporation. The inquiry thus required of interested third parties is reasonable and is precisely defined. Clearly, there was sufficient notice of the incumbrance to subsequent creditors and the court below properly held that under Connecticut law the mortgage to the Reconstruction Finance Corporation was valid as against such creditors.

2. The Court's settled rule is that it will not review or overturn a determination of state law by a district judge and court of appeals covering the particular state, in the absence of very exceptional showing of error. *MacGregor* v. *State Mutual Life Assurance Co.*, 315 U.S. 280; *Helvering* v. *Stuart*, 317 U.S. 154, 163; *Estate of Spiegel* v. *Commis-*

[4] That the repayment provisions are contained in the note but not in the mortgage raises no difficulty since, as the courts below pointed out, the note was incorporated in and recorded with the mortgage. Pet. App. pp. 10-11, 12. Furthermore, it is apparently proper under Connecticut law for a mortgage to refer even to an unrecorded note for repayment terms. *King* v. *Kilbride*, 58 Conn. 109, 119-20; *Winchell* v. *Coney*, 54 Conn. 24, 28-31.

sioner, 335 U.S. 701, 707-708; *Propper* v. *Clark,* 337 U.S. 472, 486-7. Here, all three circuit judges were residents of Connecticut, and one was a former Connecticut district judge of long experience. At its best, petitioner's attempted showing of error does not approach that which would be necessary in these circumstances.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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